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3 UNITED STATES DISTRICT COURT  
4 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
5 OAKLAND DIVISION  
6

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 vs.

10 WILLIAM A. HIRST,

11 Defendant.

Case No: CR 11-0157 SBA

**ORDER DENYING MOTION TO  
DISMISS AND DENYING  
RENEWED MOTION FOR  
DISCOVERY**

Docket 30, 31.

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13 The parties are presently before the Court on Defendant William Hirst's  
14 ("Defendant") motion to dismiss under Rule 12(b)(3) of the Federal Rules of Criminal  
15 Procedure and renewed motion for discovery under Rule 16 of the Federal Rules of  
16 Criminal Procedure. Dkt. 30, 31. The Government opposes the motions. Dkt. 32, 33.  
17 Having read and considered the papers filed in connection with these matters and being  
18 fully informed, the Court hereby DENIES the motion to dismiss and DENIES without  
19 prejudice the renewed motion for discovery, for the reasons stated below.

20 **I. BACKGROUND**

21 On March 17, 2011, Defendant was charged in a two-count indictment with  
22 violations of 18 U.S.C. § 1001 for making false statements to Internal Revenue Service  
23 ("IRS") agents. See Indictment, Dkt. 1. Count one alleges that on or around December 11,  
24 2006, Defendant made materially false, fictitious and fraudulent statements and  
25 representations to agents of the IRS during a civil estate tax audit the IRS was conducting  
26 to determine the assets and the value of the assets included in the decedent's ("ERB") estate  
27 and its federal tax liability. Id. at 1. During the course of this audit, the IRS agents  
28 presented eleven deeds to Defendant. Id. The indictment alleges that Defendant made the

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1 following false statements in connection with the eleven deeds: (1) "that he notarized those  
2 deeds on February 12, 2004"; (2) "that the signature on those deeds was ERB's"; (3) "that it  
3 was not possible that he signed ERB's signature onto some of the deeds"; (4) "that he did  
4 not know why he placed the date in front of ERB's signature on three deeds"; (5) "that he  
5 did not remember why three deeds were filed fourteen months after February 12, 2004,  
6 while the other eight were filed one month after February 12, 2004"; (6) "that he discovered  
7 three deeds had not been filed with the county recorder when he ran across them in a file";  
8 and (7) "that he did not sign ERB's name to deeds, and the signatures on the deeds were not  
9 his writing." Id. at 1-2.

10 According to the Government, the foregoing statements are false because Defendant  
11 knew at the time he made the statements that, on or about and between December 2004 and  
12 February 15, 2005: (1) he fabricated the deeds for the properties commonly known as 1051  
13 Bluebell, 41111 Blacom, and 1938, 1955, and 1979 Spruce (hereafter "Bluebell, Blacow,  
14 and Spruce"); (2) he signed ERB's name to the fabricated deeds; (3) he placed the date in  
15 front of ERB's signature on the fabricated deeds as ERB was deceased; (4) he did not  
16 notarize the fabricated deeds on February 14, 2004; (5) he knew the fabricated deeds were  
17 filed fourteen months after February 12, 2004, instead of one month later like the other  
18 deeds, because he did not fabricate them until sometime between December 2004 and  
19 February 15, 2005, and therefore could not have been filed in 2004 with the other deeds;  
20 and (6) he discovered that he did not have deeds for the Bluebell, Blacow, and Spruce  
21 properties when "SB" asked him for those deeds and when he was unable to find them in  
22 his files, he fabricated the Bluebell, Blacow, and Spruce deeds and caused them to be filed  
23 with the county recorder. Indictment at 2.

24 Count two of the indictment alleges that on or about August 5, 2008, Defendant  
25 willfully and knowingly made materially false, fictitious, and fraudulent statements and  
26 representations by stating to IRS agents during a criminal investigation that the Bluebell,  
27 Blacow, and Spruce deeds were recorded more than a year after the other deeds were  
28 recorded because they were lost. Indictment at 2-3. According to the Government, this

1 statement was false because Defendant knew at the time he made the statement that the  
2 reason the documents were recorded on or about April 4, 2005 was because they were not  
3 fabricated by him until sometime between December 2004 and February 2005. Id. at 3.

4 On July 12, 2011, Defendant filed a motion for discovery, which listed sixteen  
5 categories of requested discovery. Dkt. 9. After supplemental briefing was filed, the Court  
6 denied Defendant's motion on November 18, 2011. Dkt. 25. On March 27, 2012,  
7 Defendant filed a renewed motion for discovery, which lists four categories of requested  
8 discovery. Dkt. 30.

9 On March 29, 2012, Defendant filed a motion to dismiss the indictment. Dkt. 31-1.  
10 On April 10, 2012, the Government filed an opposition to the motion to dismiss and an  
11 opposition to the renewed motion for discovery. Dkt. 32, 33. Defendant filed reply briefs  
12 on April 17, 2012. Dkt. 34, 35.

13 On May 1, 2012, a hearing was held on the motion to dismiss and renewed motion  
14 for discovery. Dkt. 37. At the hearing, the parties agreed to meet and confer to resolve the  
15 discovery issues raised in the renewed motion for discovery. Dkt. 38 at 31-32. On June 12,  
16 2012, the Court held a status conference in which the parties represented that they are  
17 attempting to resolve all of the remaining outstanding discovery issues raised in  
18 Defendant's renewed motion for discovery.

## 19 **II. DISCUSSION**

### 20 **A. Motion to Dismiss**

21 Defendant contends that dismissal of the indictment is appropriate because the  
22 indictment does not "set forth what statement or statements are alleged to be knowingly and  
23 willfully materially false, fictitious, or fraudulent." In addition, Defendant contends that  
24 dismissal of the indictment is appropriate because 18 U.S.C. § 1001 does not embrace the  
25 oral, unsworn statements allegedly made by Defendant to IRS agents.

#### 26 **1. Legal Standard**

27 An indictment "must be a plain, concise and definite written statement of the  
28 essential facts constituting the offense charged." Fed.R.Crim.P. 7(c)(1). A defendant may

1 move to dismiss the indictment for failure to state an offense under Federal Rule of  
2 Criminal Procedure 12(b). "In ruling on a pre-trial motion to dismiss an indictment for  
3 failure to state an offense, the district court is bound by the four corners of the indictment."  
4 United States v. Boren, 278 F.3d 911, 914 (9th Cir. 2002) (citations omitted). "On [such] a  
5 motion . . . , the court must accept the truth of the allegations in the indictment in analyzing  
6 whether a cognizable offense has been charged." Id. (citation omitted). "An indictment  
7 must provide the essential facts necessary to apprise a defendant of the crime charged; it  
8 need not specify the theories or evidence upon which the government will rely to prove  
9 those facts." United States v. Cochrane, 985 F.2d 1027, 1031 (9th Cir. 1993) (citing United  
10 States v. Jenkins, 884 F.2d 433, 438-439 (9th Cir. 1989)). An indictment is sufficient to  
11 withstand a motion to dismiss "if it contains the elements of the charged offense in  
12 sufficient detail (1) to enable the defendant to prepare his defense; (2) to ensure him that he  
13 is being prosecuted on the basis of the facts presented to the grand jury; (3) to enable him to  
14 plead double jeopardy; and (4) to inform the court of the alleged facts so that it can  
15 determine the sufficiency of the charge." United States v. Rosi, 27 F.3d 409, 414 (9th Cir.  
16 1994) (citation omitted).

## 17 **2. Sufficiency of the Allegations in the Indictment**

18 A person is guilty of violating 18 U.S.C. § 1001 if he or she, "in any matter within  
19 the jurisdiction of the executive, legislative, or judicial branch of the Government of the  
20 United States, knowingly and willfully -- (1) falsifies, conceals, or covers up by any trick,  
21 scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent  
22 statement or representation; or (3) makes or uses any false writing or document knowing  
23 the same to contain any materially false, fictitious, or fraudulent statement or entry." 18  
24 U.S.C. § 1001(a).

25 Having reviewed the indictment, the Court finds that it sufficiently alleges the false  
26 statements made by Defendant to withstand a motion to dismiss. As set forth above, both  
27 counts in the indictment are supported by allegations that specifically identify the allegedly  
28 false statements and representations made by Defendant in sufficient detail to inform

1 Defendant of the essential facts constituting the charged violations of § 1001. Accordingly,  
2 Defendant's motion to dismiss is DENIED.

### 3                   3.       **Oral, Unsworn Statements**

4           Defendant contends that the indictment should be dismissed because § 1001 does not  
5 embrace the oral, unsworn statements allegedly made by Defendant to IRS agents. In  
6 support of his position, Defendant cites, without analysis, United States v. Bedore, 455 F.2d  
7 1109 (9th Cir. 1972). In Bedore, the Ninth Circuit addressed whether § 1001 applied to a  
8 false statement made by an individual to a Federal Bureau of Investigation ("FBI") agent in  
9 response to that agent's inquiry. In that case, when an FBI agent went to Bedore's home to  
10 serve him with a subpoena, Bedore denied his identity, giving his roommate's name. Id. at  
11 1110. The Ninth Circuit held that "Bedore's false statement of identity given to [the agent]  
12 is outside the scope of § 1001." Id. at 1111. In reaching this conclusion, the court reasoned  
13 as follows:

14           From the statutory history, it is evident that section 1001 was not intended to  
15 reach all false statements made to governmental agencies and departments,  
16 but only those false statements that might support fraudulent claims against  
17 the Government, or that might pervert or corrupt the authorized functions of  
18 those agencies to whom the statements were made.

18           . . .

19           The statute was not intended to embrace oral, unsworn statements, unrelated  
20 to any claim of the declarant to a privilege from the United States or to a  
21 claim against the United States, given in response to inquiries initiated by a  
22 federal agency or department, except, perhaps, where such a statement will  
substantially impair the basic functions entrusted by law to that agency.

23           Id.

24           Thus, in Bedore, the Ninth Circuit adopted a multi-part test to determine whether a  
25 limitation on § 1001 known as the "exculpatory no" doctrine should apply. See United  
26 States v. Medina de Perez, 799 F.2d 540, 544, n. 5 (9th Cir. 1986) (setting forth a five-part  
27 test to determine the proper application of the "exculpatory no" doctrine). However, in  
28 Brogan v. United States, 522 U.S. 398 (1998), the Supreme Court explicitly and

1 unequivocally rejected the "exculpatory no" doctrine as a defense to criminal liability under  
2 an earlier version of § 1001.<sup>1</sup> See id. at 408. In that case, federal agents, including agents  
3 from the IRS, asked Brogan if he had ever accepted certain illegal cash payments or gifts.  
4 Id. at 399. Brogan replied "no," which was a lie. Id. The Supreme Court upheld Brogan's  
5 conviction, holding that the "exculpatory no" doctrine embraced by many Court of Appeals  
6 is not supported by the plain language of § 1001. Id. at 408. In so holding, the Court found  
7 that recognition of any type of exception for a false statement, including a simple denial of  
8 wrongdoing, constituted a "limitation that the text [of § 1001] would not bear." See id. at  
9 401-403. The Court held that § 1001, by its terms, "covers 'any' false statement - that is, a  
10 false statement 'of whatever kind,' which includes the use of the word "no" in response to a  
11 question. Id. at 400.<sup>2</sup>

12 Here, contrary to Defendant's contention, Bedore is not controlling. In Brogan, the  
13 Supreme Court expressly held that § 1001 covers "any" false statement "of whatever kind,"  
14 which this Court concludes includes the allegedly false oral, unsworn statements made by  
15 Defendant to IRS agents in this case. This conclusion is supported by the plain language of  
16 the statute, which provides that § 1001 covers "*any* materially false, fictitious, or fraudulent  
17 statement or representation." 18 U.S.C. § 1001 (emphasis added). The text of the statute  
18 does not exclude from its reach the oral, unsworn statements at issue in this case.

19 Defendant, for his part, does not argue that a literal reading of the statute supports  
20 his contention that § 1001 does not embrace the oral, unsworn statements he allegedly  
21 made to IRS agents. Nor does Defendant cite to any controlling authority supporting his  
22 position. To the extent that Defendant relies on Bedore, his reliance is misplaced. In  
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24 <sup>1</sup> For purposes of the instant motion, the Court finds that the earlier version of §  
25 1001 is not materially different from the current version of the statute.

26 <sup>2</sup> In holding that § 1001 covers false statements of "whatever kind," the Court  
27 concluded that the statute is not limited to falsehoods that pervert government functions.  
28 See Brogan, 522 U.S. at 402. Moreover, even if the statute was limited to falsehoods that  
pervert government functions, the Court determined that falsely denying guilt in a  
government investigation would pervert government functions, since the very purpose of an  
investigation is to uncover the truth. Id.

1 rejecting the "exculpatory no" doctrine as a defense to criminal liability under § 1001,  
2 Brogan abrogated the Court of Appeal decisions that have embraced the doctrine, which  
3 includes Bedore. In doing so, the Supreme Court expressly rejected the limitation Bedore  
4 and other courts had placed on the statutory language of § 1001. Brogan, 522 U.S. at 408.  
5 Accordingly, because the construction of § 1001 that Defendant urges the Court to adopt is  
6 neither supported by the text of § 1001 nor by controlling authority, Defendant's motion to  
7 dismiss is DENIED.

8       Moreover, even assuming for the sake of argument that the "exculpatory no"  
9 doctrine is a viable defense to criminal liability under § 1001, the Ninth Circuit has held  
10 that oral statements made to IRS agents are outside the "exculpatory no" doctrine. See  
11 United States v. Ratner, 464 F.2d 101, 102-105 (9th Cir. 1972) (noting that several previous  
12 Ninth Circuit cases have held that "answers to Internal Revenue Service investigations" are  
13 outside the "exculpatory no" doctrine). Furthermore, Defendant has failed to sustain his  
14 burden to demonstrate that the multi-part test to determine whether the "exculpatory no"  
15 doctrine should apply is satisfied. See United States v. Myers, 878 F.2d 1142, 1143-1144  
16 (9th Cir. 1989) (identifying the five factors that must be satisfied to apply the "exculpatory  
17 no" doctrine and noting that the failure to meet any of the factors renders the defense  
18 unavailable to the accused). Defendant did not set forth the five-part test, let alone provide  
19 legal analysis demonstrating that the five factors are satisfied under the circumstances of  
20 this case.<sup>3</sup> Thus, to the extent that Defendant seeks dismissal of the indictment based on the  
21 "exculpatory no" doctrine, the Court finds that this request is unsupported, and therefore,  
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23       <sup>3</sup> To the extent Defendant relies on Bedore to argue that the statements at issue in  
24 this case fall within the "exculpatory no" doctrine simply because they are oral and  
25 unsworn, the Bedore court recognized that § 1001 embraces oral, unsworn statements under  
26 some circumstances. In that case, the Ninth Circuit stated that: "The statute was not  
27 intended to embrace oral, unsworn statements, unrelated to any claim of the declarant to a  
28 privilege from the United States or to a claim against the United States, given in response to  
inquiries initiated by a federal agency or department, except, perhaps, where such a  
statement will substantially impair the basic functions entrusted by law to that agency."  
Bedore, 455 F.2d at 1111. The essence of the authorities that have embraced the doctrine is  
that the materiality of the representations to the activity conducted by the federal agency  
trumps the form in which it is made, i.e., whether oral, written, sworn or unsworn.

1 lacks merit. It is not the role of the Court to make the parties' arguments for them. See  
2 Indep. Towers of Wash. v. Wash., 350 F.3d 925, 929 (9th Cir. 2003) ("Our adversarial  
3 system relies on the advocates to inform the discussion and raise the issues to the court.").

4 **B. Renewed Motion for Discovery**

5 In light of the parties' agreement to meet and confer to resolve the discovery issues  
6 raised in Defendant's renewed motion for discovery, Defendant's motion is DENIED  
7 without prejudice. If the parties are unable to resolve all of the remaining outstanding  
8 discovery issues raised by Defendant's motion through the meet and confer process,  
9 Defendant may renew his motion for discovery.

10 **III. CONCLUSION**

11 For the reasons stated above, IT IS HEREBY ORDERED THAT:

- 12 1. Defendant's motion to dismiss is DENIED.  
13 2. Defendant's renewed motion for discovery is DENIED without prejudice.  
14 3. This Order terminates Docket 30 and Docket 31.

15 IT IS SO ORDERED.

16 Dated: 8/17/12

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18 SAUNDRA BROWN ARMSTRONG  
19 United States District Judge  
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